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IN THE

Supreme Court of the United States

October Term, 1958

WIRL TELEVISION COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ILLIWAY TELEVISION, INC.; WMBD, INC.; TELE-VIEWS NEWS COMPANY, INC.; AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.; WEST CENTRAL BROADCASTING COMPANY; HILLTOP BROADCASTING COMPANY; and MID ILLINOIS TELEVISION COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. IN OPPOSITION

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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STATUTES

Communications Act of 1934, as amended

Section 303(f) (47 U.S.C. Sec. 303(f))	13, 14
Section 303(g) (47 U.S.C. Sec. 303(g))	2, 3, 10, 12
Section 303(r) (47 U.S.C. Sec. 303(r))	13
Section 307(b) (47 U.S.C. Sec. 307(b))	2, 10, 11, 12
Section 316 (47 U.S.C. Sec. 316)	13, 14
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through affiliated stations in a substantial number of other markets. In thus supplying television programs to the people of the United States, ABC is in direct competition with two other networks (CBS and NBC). The Commission is on record that networks are an integral and necessary part of television, and that healthy and effective competition among the networks is in the public interest.[6]

If the programs supplied by the networks are to be made available to the public, the networks must have "outlets" in the various markets of the United States. Unless a network can provide "clearances" for its programs, at least in the major and secondary markets of the country, the national advertiser is unwilling to sponsor network programs. Without the revenues thus provided by national advertisers, a network cannot for long underwrite the cost of expensive entertainment and public interest programing.

In the intermixed allocation table adopted by the Commission in 1952, in only 33 of the first 100 markets of the country was the Commission able to allocate three or more VHF channels; in 32 of the first 100 markets it was able to allocate only two VHF channels; and in the remaining 35 of the first 100 markets one or no VHF channels (J.A. 116-117). Thus, in 67 of the first 100 markets, it was apparent that one or more of the three national networks would have to depend on a UHF station as an "outlet" for its programs, or (alternatively) on a VHF station affiliated with another network. To complicate matters further,

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[6] In approving the ABC-United Paramount Theatres merger in February 1953 the Commission stated: "We have long recognized that network broadcasting is an integral and necessary part of radio, and we have more recently extended this recognition of the benefits of network broadcasting to the field of television. We have also recognized that the public interest is served by competition among the networks, both radio and television." 8 RR 541, 624 (1953); cf. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 198.

in large metropolitan areas heavily saturated with VHF-only receivers, the advertiser was frequently unwilling to "order" such markets unless "clearance" was obtained on a VHF station, fully realizing (no matter how good the program) that only a small portion of the audience (those with all-channel receivers and UHF converters) would be able to view the program on a UHF station in such areas. Thus, the UHF stations in VHF areas, not being ordered for high-rated network shows, were unable to develop an audience, or induce set owners to convert existing VHF receivers (see J.A. 76-78, 79-88).

It soon became apparent, under such an allocation pattern, that in the larger markets with two or more VHF stations, and in the smaller markets upon the advent of a first VHF operation, the UHF stations were beginning to fold (see J.A. 63-75). Without network programs they lost audience, without audience they lost revenue, and without revenue they could not continue to operate.

ABC as a network was hard hit by these developments. With 32 of the first 100 markets restricted to two VHF allocations, and with UHF stations folding or not building in such markets, ABC was left without an outlet of its own in key markets (e.g., New Orleans, Louisville, Providence, Dayton, San Diego, etc.). And in a number of the 33 markets (among the first 100) to which the Commission had assigned three VHF channels, a like problem existed by reason of the fact that the second or third VHF channel in those markets was tied up in long drawn out comparative hearings (e.g., St. Louis, Miami, Boston, and Pittsburgh).

To aggravate the matter further from the standpoint of developing a third competitive network, in markets with only two VHF stations on the air, those stations generally affiliated with the older networks (NBC and CBS) with more programs to offer. This, too, resulted in a vicious spiral. Unable to obtain "clearances" for its programs on

the VHF stations in markets in which an advertiser was particularly interested, the advertiser refused to buy time on ABC, with the result that ABC was losing programs and accounts to its two competitors—all because of its inability to clear its program in major and secondary markets desired by the sponsor.

Believing that at least three competitive networks were in the public interest and that the public should not be deprived of access to the programs of all the networks, ABC took an active role in urging the Commission to modify the intermixture feature of its Sixth Report by establishing at least three equally competitive facilities—all-UHF or all-VHF—in as many markets as possible. Knowing that 12 VHF channels alone could not do that job, ABC urged the Commission to abandon the "intermixture" concept utilized in the Sixth Report in 1952, pointing out that UHF channels were going to waste in the larger markets upon the advent of a second VHF operation, and in the smaller markets on the advent of a first VHF station. ABC so argued in Docket No. 11532, where the Commission finally concluded to abandon its intermixture concept—to make use of UHF channels in areas where UHF was providing a satisfactory service, and to shift VHF channels from such areas (where experience had shown that they were killing off UHF operations) into predominantly VHF areas in need of additional service but where UHF could not gain a competitive foothold (13 RR 1571).

In comments supporting the Commission's proposal to deintermix Springfield, ABC pointed out what was happening to UHF in VHF areas, and the resulting loss of service to the public (J.A. 112-114). It reminded the Commission of the importance of effective network competition (J.A. 114-117). It noted that UHF has some advantages over VHF, in areas where it is not smothered by VHF signals (J.A. 118-119). ABC noted how the pro-

posed shift would satisfy each of the five criteria spelled out in Docket No. 11532 (J.A. 117-120). Finally, ABC submitted two highly significant charts (J.A. 122-123), showing the clearance problems which confront a network in markets with an inadequate number of equally competitive services, and the resulting inability of the public to have access to the programs of all three networks.

In the light of these and related comments, the Commission concluded (J.A. 183-209) that by shifting Channel 2 from Springfield and by reassigning that channel to both St. Louis and Terre Haute, Springfield would have two and possibly three television stations (instead of one), St. Louis would have four (instead of three) commercial operations, and Terre Haute would have a second station—thus providing more television service to the public and more effective competition among the three national networks in each of these three markets.

The foregoing action by the Commission implemented rather than contravened the requirements of the Communications Act. Section 303(g) of the Act places upon the Commission the responsibility of encouraging "the larger and *more effective use* of radio in the public interest." An intermixed system of channel allocations where the net effect of a VHF operation is to close down one or more existing UHF stations does not constitute an "*efficient,* and equitable distribution of *radio service*" within the meaning of Section 307(b). UHF "paper allocations" do not constitute "radio service."

"As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels alone, are not adequate to make possible sufficient outlets for a fully competitive television system." *Second Report on Deintermixture,* 13 RR 1571, 1575, para. 12 (1956). In fact, as the Commission itself concluded in its Sixth Report of April 1952, an additional 70 channels (available only in the UHF portion of the spectrum) are needed to provide a truly

nationwide competitive system (see J.A. 77-78, 79-80). But as events subsequent to 1952 showed, a policy of intermixing VHF and UHF channels in the same markets was resulting in less service rather than more service (13 RR 1571; see J.A. 81). Large markets which could support three or more television operations but which (because of the limited number of VHF channels) had received only two VHF assignments in 1952 were being restricted to two stations (both on VHF), with the UHF assignments going begging in those markets. Likewise, in smaller markets where the Commission originally allocated one VHF and one or more UHF channels, the UHF stations were folding with the advent of the VHF station (J.A. 63-75). It was unthinkable that the 70 UHF channels (a major portion of the television spectrum) should be allowed to go to waste (see J.A. 79-82).

Thus, under the evidence adduced in Docket No. 11747, the Commission was fully justified in deleting Channel 2 from Springfield, if for no other reason than to improve the number of competitive services in and around Springfield-Decatur and even though it had to place the deleted VHF channel "on ice" without reassigning it elsewhere—as it did in the *Vail Mills* and *Elmira* cases, likewise decided March 1, 1957. 22 FCC Reports 293; 22 FCC Reports 307. Technically speaking, therefore, petitioner is in no position to raise a Section 307(b) question (based on the comparative needs of Springfield and St. Louis) unless and until petitioner first shows that the retention of Channel 2 in Springfield would serve the "public interest." In the light of what has happened in other comparable sized markets to UHF stations, upon the advent of a first VHF operation, the Commission properly concluded that Springfield-Decatur would have more service (from multiple UHF operations) if VHF Channel 2 were deleted than if it were kept in that market (J.A. 198-200).

II.

After concluding that in any event Channel 2 should be deleted from Springfield (J.A. 192), the Commission then considered other areas to which Channel 2 might be assigned—VHF areas where the utilization of Channel 2 would mean an additional service with no adverse impact on UHF operations. In its Sixth Report the Commission had concluded that St. Louis was a market of sufficient size to warrant six commercial assignments (three VHF and three UHF). With the failure of "intermixture," it was apparent that St. Louis would eventually be limited to three commercial channels (all VHF). Similarly, Terre Haute had been allocated two frequencies in 1952, but with the VHF station getting on the air first, the UHF channel had no "takers." A second competitive service was obviously needed in that market. Since, as the Commission found, it was not in the public interest to leave Channel 2 in Springfield (where in all probability it meant the demise of the UHF stations in Springfield and Decatur), there was every reason not to let the channel go to waste. Under these circumstances, since the utilization of Channel 2 in Terre Haute and St. Louis would mean an additional service in each of these markets, with no deterrent effect on the growth and development of UHF, public interest considerations clearly dictated the reassignment of the deleted channel to those markets. This the Commission did (J.A. 198-202).

Such action, we submit, implemented rather than contravened the requirements of the Communications Act, including Section 307(b). The Commission's authority, by prior rule-making proceedings, to set aside one class of frequencies for "communities" of one type and a different class of frequencies for "communities" of another type has long been recognized. See *Huntington Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). Thus, the Commission prop-

erly decided in Docket No. 11532 (by its Second Report on Deintermixture) to make greater use of UHF channels in areas where UHF is providing satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot hope to provide a competitive service. To that end, in the instant proceeding, it first decided to make Springfield-Decatur all-UHF—by deleting Channel 2 in that area. It was this action which aggrieved petitioner. What use was made of Channel 2 after it was lost to Springfield is of no moment to petitioner. But rather than allow the channel to go to waste, it was placed in two VHF areas which were in need of an additional service and where UHF "paper" allocations were not providing "radio service" (Terre Haute and St. Louis).

In short, by deleting Channel 2 in Springfield (and substituting UHF channels therefor) and by reassigning that channel to both Terre Haute and St. Louis, such action meant that Springfield-Decatur would have three or more commercial stations (instead of one), St. Louis would have four (instead of three), and Terre Haute would have a second station.[7] In thus providing more television service to the public in those areas and more effective competition among all three networks, the Commission's action implemented rather than contravened the requirements of Sections 303(g) and 307(b) of the Act (47 U.S.C. Secs. 303(g) and 307(b)). This Court's decisions in the *Nelson Brothers*, *Allentown* and *Sanders* cases, on which

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[7] Subsequent developments fully support the wisdom of the Commission's action. As a result of the action here challenged, the programs of all three networks are now available in the St. Louis area. Springfield-Decatur (instead of being limited to one station on VHF Channel 2) has two UHF operations (stations WTVP and WICS); it has channels available (when the instant litigation is concluded) for a third operation. In Terre Haute, where the UHF had gone begging for five years, multiple applications have been filed requesting authority to establish a second service in that market on VHF Channel 2.

petitioner relies (Pet. pp. 12, 13, 19, 20, 22-24), dealt with an entirely different problem and are in no way in conflict with the decision below.

CONCLUSION

The Commission's action here challenged was properly affirmed by the court below. There is no conflict of decision. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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